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In the Supreme Court of the United States

OCTOBER TERM, 1994

PHILLIPS PETROLEUM COMPANY, PETITIONER

v.

GARY JOHNSON, ET AL.

ATLANTIC RICHFIELD COMPANY, CROSS-PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the limitations period under 28 U.S.C. 2415(a) during which the United States may commence an "action for money damages" founded upon a contract governs either the issuance by the Department of the Interior's Minerals Management Service of an administrative order directing a lessee to pay royalties due under a federal oil and gas lease or the government's filing of a counterclaim (in a suit brought by the lessee challenging the order) for enforcement of such an administrative order.

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OPINIONS BELOW

The supplemental opinion of the court of appeals on the matter at issue here (Pet. App. 1a-4a)[1] is not

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[1] Unless otherwise noted, references are to the petition and accompanying appendix in No. 94-1287.

reported, but the decision is noted at 36 F.3d 89 (Table). That court's prior opinion (Pet. App. 5a-14a) is reported at 22 F.3d 616. The opinion, orders, and judgment of the district court (Pet. App. 15a-78a) are unreported, as are the orders of the Department of the Interior's Minerals Management Service (Pet. App. 79a-100a).

JURISDICTION

The court of appeals entered its initial judgment on June 10, 1994. The court thereafter granted rehearing and entered a new judgment addressing the question presented here (but otherwise abiding by the prior opinion) on September 7, 1994. A further petition for rehearing was denied on November 1, 1994. Pet. App. 101a-103a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The complicated procedural history of this case is discussed in some detail in our petition for a writ of certiorari in *Babbitt* v. *Phillips Petroleum Co.*, No. 94-1292 (filed Jan. 30, 1995). We repeat or add here only the background and details particularly relevant to the limitations issue raised by the present petition and cross-petition.

1. Congress has authorized the Department of the Interior to enter into and administer leases providing for the development of federal oil and gas resources, including those located off the coast of the United States. See, *e.g.*, 43 U.S.C. 1331 *et seq.* (the Outer Continental Shelf Lands Act (OCSLA)). Leases for development of offshore oil and gas are generally to be granted to "the highest responsible qualified bidder" after a public, competitive bidding process, and gen-

erally provide for payment of royalties calculated as a specified percentage of the "amount or value of the production saved, removed, or sold" by the lessee. 43 U.S.C. 1337(a)(1). The value of production is to be determined by the Director of the Minerals Management Service (MMS) in the Department of the Interior, and must "never be less than the fair market value." 30 C.F.R. 206.150 (1987).[2] As a practical matter, however, lessees track and report their own production, its value, and the royalties due thereon, subject to audit by MMS's Royalty Compliance Division. See generally, *e.g.*, 30 C.F.R. 217.50, 218.50; see also *Cities Service Oil & Gas Corp.*, 113 IBLA 255, 260 (1990).

In 1983, Congress concluded that the government's methods of determining and collecting oil and gas lease royalties were "archaic and inadequate." Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), Pub. L. No. 97-451, § 2(a)(2), 96 Stat. 2448 (1983), codified at 30 U.S.C. 1701(a)(2). Congress therefore acted "to clarify, reaffirm, expand and define the authorities and responsibilities of the Secretary of the Interior to implement and maintain a royalty management system for oil and gas leases," and "to require the development of enforcement practices that ensure the prompt and proper collection and disbursement of oil and gas revenues owed to the United States." 30 U.S.C. 1701(b)(2)-(3).[3]

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[2] The valuation regulation applicable to the periods of production at issue in this case was substantially expanded and redesignated as of March 1, 1988. See 30 C.F.R. 206.152-206.153; 53 Fed. Reg. 1230 (1988).

[3] Section 109 of FOGRMA establishes a graduated scale of penalties for persons who fail or refuse to comply with FOGRMA or related requirements. 30 U.S.C. 1719. Section

FOGRMA directs the Secretary to establish "a comprehensive inspection, collection and fiscal and production accounting and auditing system * * * to accurately determine oil and gas royalties * * * and to collect and account for such amounts in a timely manner." 30 U.S.C. 1711(a). In particular, the Act directs the Secretary to "audit and reconcile, to the extent practicable, all current and past lease accounts for leases of oil or gas and [to] take appropriate actions to make additional collections or refunds as warranted." 30 U.S.C. 1711(c)(1). Lessees, in turn, are required to maintain and provide whatever records, reports, and information the Secretary may reasonably require by rule for purposes of implementing the Act. 30 U.S.C. 1713(a). Relevant records must be maintained for six years "unless the Secretary notifies the record holder that he has initiated an audit or investigation involving such records," in which case they must be maintained "until the Secretary releases the record holder" from its retention obligation. 30 U.S.C. 1713(b).

The Secretary has delegated responsibility for administering lease arrangements and enforcing royalty requirements to the Director of the MMS. See generally 30 C.F.R. Pt. 218 (1987); 30 C.F.R. 218.150, 241.51 (1987). Lessees may appeal the orders or decisions of subordinate MMS officials to the Director. See 30 C.F.R. 290.1-290.5 (1987). The

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112(a) confers broad authority on the Attorney General, "[i]n addition to any other remedy under [FOGRMA] or any mineral leasing law," to bring civil actions in the federal courts "to restrain any violation of [FOGRMA]" or "to compel the taking of any action required by or under [FOGRMA] or any mineral leasing law of the United States." 30 U.S.C. 1722(a).

Director's decisions, in turn, are subject to review by the Interior Board of Land Appeals (IBLA), which renders final agency decisions on such issues on behalf of the Secretary. See 30 C.F.R. 290.7 (1987); 43 C.F.R. 4.1, 4.1(b)(3) (1987).

2. In 1986, the Regional Manager of MMS's Tulsa, Oklahoma compliance office ordered a lessee affiliate of cross-petitioner Atlantic Richfield Company (ARCO) to pay additional royalties on prior production of certain natural gas liquid products (NGLPs). ARCO appealed that order to the MMS Director, who affirmed it. See 94-1292 Pet. App. 100a-101a. ARCO then appealed to the IBLA, which modified MMS's NGLP valuation methodology and remanded for recomputation of the additional royalties due. *Conoco and ARCO Oil & Gas Co.*, 110 IBLA 232 (1989) (*reprinted at* 94-1292 Pet. App. 98a-121a); see also 94-1292 Pet. 8-10.

Shortly after the IBLA's decision on ARCO's appeal, MMS issued three additional NGLP royalty compliance orders to ARCO and one to petitioner Phillips Petroleum Company. Petitioners[4] both filed suit to block enforcement of the orders, arguing in part that some or all of the additional royalty claims were barred by the statute of limitations set out in 28 U.S.C. 2415(a) for government suits seeking money damages for breach of contract. ARCO later amended its complaint to add a challenge to the IBLA's decision. The two actions were consolidated with each other and with two additional suits by Phillips raising similar statute-of-limitations (and

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[4] For simplicity, we refer to petitioner Phillips and cross-petitioner ARCO collectively as "petitioners."

other) issues in the context of a different royalty dispute.[5]

After the Department had filed its initial answer, a different district court hearing a similar case brought by Phillips to enjoin enforcement of another royalty compliance order issued by the MMS held that the government was required to file a counterclaim in order to seek enforcement of the order. See *Phillips Petroleum Co.* v. *Lujan*, No. 89-C-914-B (N.D. Okla. May 5, 1992). Although the Department disagreed with that decision, it moved to protect its position in this litigation by requesting leave to amend its answer and to add counterclaims seeking a declaration of the validity of the MMS orders and a court order requiring Phillips and ARCO to comply with the MMS orders. See Gov't C.A. Br. 8-9 & n.5. Petitioners opposed the government's motion, arguing that because the counterclaims were "merely the mirror image of plaintiffs' complaints," they were "not complaints for money damages as required by 28 U.S.C. § 2415." See *id.* at 9. The district court granted the government's motion to file the counterclaims, to relate back to the date of the government's original answers. See *ibid.*

ARCO moved for summary judgment on the counterclaims, contending that the government's

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[5] The non-NGLP cases challenged MMS orders requiring payment of additional royalties on certain amounts received from purchasers as reimbursement for production-related costs. The substantive issue involved was resolved in favor of the government in other litigation, see *Mesa Operating Ltd. Partnership* v. *United States Dep't of Interior*, 931 F.2d 318 (5th Cir. 1991), cert. denied, 502 U.S. 1058 (1992), leaving primarily the limitations challenge to be resolved in this proceeding.

counterclaims did not constitute "a complaint (or even a counterclaim) for money damages, as required by § 2415," and that "the enforceability of the orders must await the filing by the defendants of the proper procedural vehicle to collect the royalties that are claimed due—a complaint for money damages." See Gov't C.A. Br. 9. Phillips similarly argued that the counterclaims did not constitute complaints for money damages. See *id.* at 9-10.

On petitioners' initial claims challenging the MMS orders, the district court granted partial summary judgment for the Secretary, upholding the Department's NGLP valuation methodology and the orders' requirement that the companies recompute royalties due. Pet. App. 52a-77a. The court also granted partial judgment for petitioners, holding that Section 2415(a) "bars the Government from bringing any causes of action against Phillips and ARCO based on royalty payments * * * that are due and owing for more than six years." Pet. App. 52a; see *id.* at 37a-52a, 77a. In a later order (*id.* at 18a-20a) granting in part the government's motion for summary judgment on the counterclaims, however, the court clarified that its prior order had "ruled that the MMS's orders issued to Phillips and ARCO were valid and enforceable." *Id.* at 18a. Noting that its prior discussion of Section 2415(a) "applie[d] only to an 'action for money damages'" and "indicate[d] how the Court would treat a claim for money damages if one were to be filed," the court made clear that "no such action is currently pending" and that "section 2415 has no direct application to the MMS orders." Pet. App. 19a. The court therefore granted judgment on the counterclaims to the extent that the government sought to enforce the MMS orders in accordance with their

terms and those portions of the court's order granting summary judgment on the merits. *Id.* at 15a-17a.

3. The court of appeals initially reversed on the basis of an interpretation of the rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. 553(b), relevant to some but not all of the consolidated cases, without reaching the statute-of-limitations issue. Pet. App. 5a-14a. The panel's APA ruling is the subject of our petition for a writ of certiorari in No. 94-1292. Both parties sought rehearing on the limitations question, and the court issued a supplementary opinion resolving the issue in favor of the Secretary. Pet. App. 1a-4a.

The court rejected petitioners' argument that 28 U.S.C. 2415(a) bars the issuance or enforcement of administrative orders to pay past due royalties, holding that "actions for money damages" within the meaning of that Section "are commenced by filing a complaint" and involve "a suit in court seeking compensatory damages." Pet. App. 3a. In this case, the court held, the United States had filed no "complaint" for purposes of Section 2415(a). Pet. App. 3a & n.1. In addition, relying on this Court's decision in *Bowen* v. *Massachusetts*, 487 U.S. 879, 893 (1988), the court held that the royalties sought by the MMS orders could not be considered "compensatory," and therefore did not fall within the proper construction of the term "money damages" as used in 28 U.S.C. 2415(a). Pet. App. 4a. Thus, collection of royalties through enforcement of the agency's orders was not barred by Section 2415(a). Pet. App. 4a.

ARGUMENT

1. Petitioners argue (*e.g.*, Pet. 25) that the general statute of limitations for "action[s] for money damages brought by the United States * * * founded upon any contract," 28 U.S.C. 2415(a), bars the Department of the Interior from issuing an administrative order for the payment of royalties on a federal offshore gas lease, or from seeking judicial enforcement of such an order, more than six years after petitioners' obligation to calculate and pay those royalties first arose.[6] That contention is incorrect for several reasons.

a. Section 2415(a) is a general background statute of limitations, which applies "except as otherwise provided by Congress." 28 U.S.C. 2415(a).[7] As described above, however (see pages 2-5, *supra*), the Outer Continental Shelf Lands Act (OCSLA), the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), and the regulations implementing them together create a comprehensive structure for the administration and development of federal offshore natural gas resources. That structure contains its own enforcement mechanisms, which do not depend on the filing of any "action for money damages" covered by Section 2415(a).

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[6] The cross-petition in No. 94-1479 merely "adopts and incorporates by reference" the petition in No. 94-1287 (94-1479 Pet. 6), without advancing any significant additional argument. Our response therefore does not differentiate between the two.

[7] Limitations provisions such as Section 2415(a) are, of course, to be strictly construed in favor of the government. *Badaracco* v. *Commissioner*, 464 U.S. 386, 391 (1984) (quoting *E.I Dupont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462 (1924)).

Lessees are initially responsible for computing and paying the royalties due under their leases. The Secretary retains, however, the ultimate authority to determine the value of the production on which royalties are based, and lessees remain responsible to make required royalty payments "in the time and manner * * * specified by the Secretary." 30 U.S.C. 1712(a)(1). That system requires, and the law provides, a structure for the audit of lessees' payments and the refund or collection of amounts overpaid or underpaid. See generally 30 U.S.C. 1701, 1711(a) and (c).

As petitioners explain (Pet. 5-6), once an audit identifies a possible underpayment, Minerals Management Service (MMS) officials consult with the lessee in an attempt to agree on the proper amount. If that attempt fails, the MMS issues an order directing the lessee to pay the additional amount it determines to be due. That order is appealable within the Department of the Interior, and the Department's final decision, rendered by the Interior Board of Land Appeals (IBLA), is subject to review by the courts.[8]

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[8] The Department's regulations require a lessee to exhaust its administrative remedies before challenging a royalty payment order in court. 30 C.F.R. 243.3; see also 43 C.F.R. 4.21(c) (addressing exhaustion at administrative appeals stage). Although Section 243.3 was first adopted in 1992, the Department has taken the position (in *Atlantic Richfield Co.* v. *Babbitt*, No. 93-5040 (10th Cir.) (argued Nov. 16, 1994)) that its regulations and the structure of the administrative process required exhaustion before then, including at the time of the orders in this case. See 43 C.F.R 4.21(c) (1991); 30 C.F.R. 243.2 (1991) (authorizing suspension of MMS orders to pay additional royalties pending appeal to Director of MMS); *Marathon Oil Co.*, 90 IBLA 236 (1986) (discussing standards for suspension in such cases); *Darby* v. *Cisneros*, 113 S. Ct. 2539 (1993) (con-

Petitioners argue (Pet. 6) that in order to collect an amount that the MMS has ordered the lessee to pay, "the MMS must seek enforcement of its order from a federal district court." The practical reality, however, is different.

In the Department's experience, once an order to pay has been issued, the lessee either pays the amount due or pursues the available administrative procedures to challenge that order, perhaps followed by judicial review of a final administrative decision affirming the MMS's position.[9] Where a court upholds the Department's final decision, the lessee routinely pays the royalties due. Congress has provided a variety of remedies for nonpayment. See 30 U.S.C. 1719(c)(1) (penalty for "knowingly or willfully fail[ing] to make any royalty payment by the date as specified by * * * order"); 30 U.S.C. 1719-1720 (other civil and criminal penalties under FOGRMA); 30 U.S.C. 1722(a) (civil action to "restrain any violation" or to "compel the taking of

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struing 5 U.S.C. 704 with respect to finality and exhaustion). In these cases, some of the MMS orders issued to Phillips were affirmed by the Assistant Secretary of the Interior for Land and Minerals Management, thus obviating, as a practical matter, any question of finality as to them. Similarly, because ARCO amended its complaint to include a challenge to the final IBLA decision concerning NGLP valuation, the government did not raise a finality objection to judicial review of the other NGLP orders, which involved substantially identical legal issues. See Pet. App. 36a n.6; compare Pet. 6 (asserting, in passing, a much broader finality argument).

[9] Some lessees have paid the amount due under an administrative order and then sought recovery in the United States Court of Federal Claims. *E.g.*, *Black Butte Coal Co.* v. *United States*, 27 Fed. Cl. 699, vacated after settlement, 14 F.3d 612 (Fed. Cir. 1993).

any action required"); 43 U.S.C. 1350 (civil and criminal penalties under OCSLA); 43 U.S.C. 1334(d) (cancellation of leases under OCSLA for non-compliance with the Act, regulations, or lease). Direct judicial enforcement of a royalty payment order is only one such remedy. Indeed, the Department of the Interior is not aware of any action first brought by the government for judicial enforcement of a royalty payment order.[10]

The various statutory provisions just cited (together with the implementing regulations) represent, in structure and practice, a comprehensive royalty assessment and collection system. Within that system, Congress has provided certain legal or practical time limitations. See 30 U.S.C. 1755 (non-fraud civil penalty actions must be brought within six years); 30 U.S.C. 1713(b) (records on which audits are based must be maintained for a minimum of six years, unless the Secretary notifies the lessee that he has initiated an audit or investigation and that the records must be retained for a longer period). It is unlikely that when Congress enacted those provisions, and directed the Secretary to "audit and reconcile * * * *all* current and past lease accounts * * * and [to] take appropriate actions to make additional collections or refunds as warranted" (30 U.S.C. 1711(c)(1) (emphasis added)), it intended to incorporate *sub silentio* an additional limitations

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[10] The government need not counterclaim for enforcement as part of its response to a lessee's judicial challenge to the validity of a royalty payment order. See *Mesa Operating Ltd. Partnership* v. *United States Dep't of Interior*, 17 F.3d 1288, 1291-1292 (10th Cir. 1994). The counterclaim filed in this case was essentially protective. See page 6, *supra*.

provision designed for general actions to redress breaches of contracts with the government. To the contrary, the requirement in 30 U.S.C. 1713(b) that a producer maintain its records indefinitely, so long as the Secretary has notified it, within an initial six-year retention period, that he has "initiated an audit or investigation," strongly implies that Congress did not envision the application of a six-year statute of limitations drawn from outside FOGRMA's comprehensive statutory scheme. For these reasons, administrative and judicial proceedings involving the oil and gas royalty management provisions represent the sort of actions for which Congress has "otherwise," and more specifically, provided, and to which 28 U.S.C. 2415(a) simply has no application.

b. In any event, the other terms of Section 2415(a) make clear that it does not apply to bar enforcement of the royalty payment orders at issue in this case. The counterclaim in this case sought enforcement of administrative orders that petitioners had put at issue before the court through *their* complaint seeking a declaration that those orders were invalid. As the court of appeals held, neither the orders themselves nor the counterclaim for enforcement may properly be considered a "complaint" initiating an "action for money damages" within the meaning of Section 2415(a). Pet. App. 3a-4a & n.1; see also *id.* at 19a.

As described above, the normal practice under the Acts in question here is for producers to comply with the Interior Department's royalty payment orders, certainly once their validity has been upheld on judicial review. It should make no difference that in this case the Department asked the reviewing court to enter its own order confirming petitioners'

responsibility to pay. That request is not, in any traditional sense, an "action for money damages."

The situation is analogous, instead, to that in *Bowen* v. *Massachusetts*, 487 U.S. 879, 892-893 (1988), in which this Court held that an action to compel the federal government to pay to a State money claimed to be owed under the statutory terms of the Medicaid program was not an action seeking "money damages" within the meaning of the second sentence of 5 U.S.C. 702. The enforcement claim (and the underlying order) in this case, like the statutory reimbursement claim in *Bowen*, invoked the equitable powers of the district court to require petitioners "to belatedly pay expenses that [they] should have paid all along" under the applicable statutory and regulatory scheme. *Bowen*, 487 U.S. at 893-894 (quoting *School Committee* v. *Department of Education*, 471 U.S. 359, 370-371 (1985)). Under OCSLA and FOGRMA, the Secretary is entitled to determine the value of production that is subject to royalties and to implement that determination through payment orders. Equitable enforcement of such an order is not an order to pay "money damages." See also *Bowen*, 487 U.S. at 893-901.[11]

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[11] The *Bowen* Court pointed out (487 U.S. at 893) that "[t]he fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'" Instead, the Court distinguished (*ibid.*) "an action at law for damages" from "an equitable action for specific relief." The Court quoted extensively (*id.* at 895) from Judge Bork's opinion in *Maryland Dep't of Human Resources* v. *Department of Health & Human Services*, 763 F.2d 1441, 1446 (D.C. Cir. 1985), in which he noted that the State was "seeking funds to which a statute allegedly entitle[d] it, rather than money in compensation for the losses * * *

c. Nor may the government's request for enforcement of its royalty payment order properly be characterized, under Section 2415(a), as an "action * * * founded upon [a] contract." Any request for enforcement of an order is, of course, founded upon the order to be enforced. And in this case that order is properly "founded" upon the statutory and regulatory requirements that lessees pay royalties on the full value of their production from federal leases, and upon MMS's corresponding audit and collection responsibilities.

To be sure, in designing its system for administering the private exploitation of the public's offshore natural gas resources, Congress built around a lease arrangement similar to that traditionally used for production arrangements among private parties. The mere fact that such a lease is itself a "contract" does not, however, transform an MMS order to pay, issued under an administrative scheme designed to implement the Secretary's independent responsibility to determine production values and collect appropriate royalties, into a mere contract claim. Nor can it transform a request to enforce such an order into an "action" that is "founded upon" a contract. Cf. *Transohio Sav. Bank* v. *Director, OTS*, 967 F.2d 598, 609 (D.C. Cir. 1992) (claims based on statutory obligations are not

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[that it had] suffered by virtue of the withholding of those funds." Similarly, in this case the government, in its counterclaim, merely asked the district court to give effect to the court's own judgment concerning the validity of the MMS orders (see Pet. App. 18a-19a & n.2)—or, at most, to "compel the taking of [an] action required by or under" FOGRMA, in accordance with the *equitable* enforcement provisions of 30 U.S.C. 1722(a).

contractual for purposes of 5 U.S.C. 702, even if those obligations are incorporated in a contract); *Katz* v. *Cisneros*, 16 F.3d 1204, 1209 (Fed. Cir. 1994) (similar).

All of the numerous cases involving disputes between the MMS and producers over royalty obligations have turned on questions of statutory and regulatory construction, not on the meaning of contract terms. See, *e.g.*, *Amoco Production Co.* v. *Lujan*, 877 F.2d 1243 (5th Cir.), cert. denied, 493 U.S. 1002 (1989); *Diamond Shamrock Exploration Co.* v. *Hodel*, 853 F.2d 1159 (5th Cir. 1988); *Mesa Operating Ltd. Partnership* v. *United States Dep't of the Interior*, 931 F.2d 318 (5th Cir. 1991), cert. denied, 502 U.S. 1058 (1992); *Hoover & Bracken Energies, Inc.* v. *United States Dep't of Interior*, 723 F.2d 1488 (10th Cir. 1983), cert. denied, 469 U.S. 821 (1984). In this case, too, petitioners' challenges to the MMS orders on their merits involved the interpretation of applicable statutory and regulatory provisions, not the construction of any of the terms of petitioners' various lease instruments. When the Department's position is sustained and an order's validity upheld in such litigation, a request for enforcement of the order engages neither the language nor the policies of Section 2415(a).

2. Petitioners contend further (Pet. 14) that the decision below is "in tension" with that in *3M Co.* v. *Browner*, 17 F.3d 1453 (D.C. Cir. 1994). They base that contention on the court of appeals' rejection of petitioners' novel theory (Pet. 14-15, 25-26) that Section 2415(a) applies not only to judicial filings seeking enforcement of administrative royalty payment orders (such as the government's counterclaim in this case), but to the agency's issuance of those orders themselves.

3M applied a very different general limitations provision, 28 U.S.C. 2462, which imposes a five-year limit on any "action, suit or proceeding" to enforce a civil penalty. The court in *3M* focused on Section 2462's use of the term "proceeding," the fact that the Administrative Procedure Act and other statutes "call[] agency adjudications 'proceedings,'" see 5 U.S.C. 554(b), and the use of the same term in the defendant Environmental Protection Agency's regulations to describe the agency's process for assessing civil penalties. 17 F.3d at 1456. Under those circumstances, the court held that Section 2462 governed the EPA's initiation of administrative civil penalty "proceedings" as well as the commencement of a judicial action.

Section 2415(a), by contrast, does not use the term "proceeding." The court of appeals correctly recognized (Pet. App. 3a) that the statutory terms "complaint" and "action for money damages" refer to "a suit in court." Petitioners' contrary theory would transform the statutory phrase "unless the complaint is filed" into "unless the preliminary agency action, subject to internal appeal and later judicial review, is taken." That construction is implausible, and would conflict with language elsewhere in the same statute (which clearly refers to judicial actions) as well as with decisions of other courts. See 28 U.S.C. 2415(e) (referring to actions "timely brought" and then "dismissed without prejudice," and to the "defendant" in a subsequent action); see also, *e.g.*, *S.E.R., Jobs For Progress, Inc.* v. *United States*, 759 F.2d 1, 4-5 (Fed. Cir. 1985) (contract officer's decision and subsequent administrative proceedings not subject to Section 2415(a)); *Doko Farms* v. *United States*, 956 F.2d 1136, 1139-1141 (Fed. Cir. 1992) (statute barring suit to

collect amount due "does not bar the government from invoking its administrative remedies"); *Thomas* v. *Bennett*, 856 F.2d 1165, 1169 (8th Cir. 1988) (running of statute of limitations barred suit on student loan, but not set-off of amount due against later tax refund).

3. Finally, petitioners contend (Pet. 11-12) that the decision below conflicts with those of the Tenth Circuit in *Phillips Petroleum Co.* v. *Lujan*, 4 F.3d 858 (1993), and *Mesa Operating Ltd. Partnership* v. *United States Dep't of Interior*, 17 F.3d 1288 (1994).[12] In fact, however, the Tenth Circuit has never addressed the question presented by the petition and cross-petition.

In *Phillips*, the government did not dispute the general applicability of Section 2415(a) in the district court, and that question was neither briefed nor argued to the court of appeals. Both the parties and the court focused instead on questions of accrual and tolling, as affected by the special nature of the federal leasing and audit program. Under the circumstances, the court's notation (4 F.3d at 860 n.1), in passing and without analysis, that it "agree[d] with the parties that 28 U.S.C. § 2415(a) is the controlling statute of

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[12] Petitioners also argue (Pet. 12-14) that the decision below conflicts with a variety of decisions applying Section 2415(a). Most of those decisions are simply inapposite, because they involved claims that were concededly contractual, in circumstances far removed from the specialized statutory and administrative regime involved here. See Pet. 13-14, and cases there cited. Indeed, in light of the cases petitioners cite, their observation that "the application of Section 2415(a) depends on the substance of a claim rather than its form" (Pet. 14) supports the government's position more clearly than it does their own.

limitations," cannot be accepted as an authoritative holding. See, *e.g.*, *Director, OWCP* v. *Greenwich Collieries*, 114 S. Ct. 2251, 2257 (1994); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952); *In re Stegall*, 865 F.2d 140, 142 (7th Cir. 1989) (Posner, J.).

Similarly, in *Mesa* the Tenth Circuit assumed, but did not decide, the applicability of Section 2415(a). See 17 F.3d at 1289, 1291. Mesa had already lost a substantive challenge to a royalty payment order in the Fifth Circuit. See *id.* at 1290. In the Fifth Circuit litigation, Mesa had never claimed limitations as a bar to enforcing the order, and it had posted a bond promising to pay if it lost the case. See *id.* at 1290-1291. After the government reiterated its demand for payment, Mesa sued in a district court in the Tenth Circuit to bar collection, relying on Section 2415(a). The parties briefed the applicability of that Section before the court of appeals (see, *e.g.*, 92-5241 Gov't C.A. Br. 20-26), but the court did not reach the issue. Instead, the court concluded that, under the circumstances, Mesa's conduct of the prior litigation precluded any application of the statute of limitations.

Thus, contrary to petitioners' contention, the issue of whether Section 2415(a) applies to requests for judicial enforcement of natural gas royalty payment orders of the sort at issue here remains open in the Tenth Circuit. We are informed that there are at least a dozen cases presently pending in district courts in that circuit, the Ninth Circuit, and the District of Columbia Circuit in which the appli-

cability of Section 2415(a) is squarely presented.[13] If and when those cases reach the appellate level, each of the relevant courts of appeals will have the opportunity to consider the matter *de novo*, with the benefit of full briefing and argument. If any of those courts disagrees with the decision in this case and holds that Section 2415(a) does apply in like circumstances, a concrete circuit conflict on that issue will then be presented. The Court may then consider whether the issue is of sufficient practical importance to warrant review.[14] Until that time, however, review by this Court would be premature.

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[13] In two cases the issue has been fully briefed and argued and the parties are awaiting decisions. *Marathon Oil Co.* v. *Babbitt*, No. 94-N-1429 (D. Colo.); *Samedan Oil Corp.* v. *Deer*, No. 94-CV-02123 (RCL) (D.D.C.). Briefing is scheduled to begin in April in a third case, *Atlantic Richfield Co.* v. *Department of Interior*, No. 94-62-BLG-JDS (D. Mont.).

[14] As petitioners acknowledge (Pet. 18 n.8), even if Section 2415(a) applies to the issuance or enforcement of royalty payment orders, further questions (not presented by petitioners in this case) necessarily arise concerning when the government's cause of action accrues under that Section, and the application of the tolling provision in 28 U.S.C. 2416(c) in the particular context of MMS audits under FOGRMA. Section 2416(c) excludes, for purposes of computing the six-year limitations period under Section 2415(a), "all periods during which * * * facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances." In the *Phillips* case on which petitioners rely in asserting a conflict here, the Tenth Circuit recognized that the government will usually need to conduct an audit to discover that additional royalties are owed, and that FOGRMA's auditing and record-retention provisions would have to be taken into account in determining when the government "reasonably" should have known of an underpayment of

CONCLUSION

The petition and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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royalties. See 4 F.3d at 863-864. Petitioners therefore err in suggesting that the application of Section 2415(a) would necessarily result in a rigid six-year limitations period. Because the Tenth Circuit has not yet *either* passed upon the argument that Section 2415(a) does not apply at all in this setting *or* elaborated further, since *Phillips*, on how tolling principles should be applied in this setting, it is not clear at this point how much, if any, practical difference there might ultimately be in the results reached by the court below and the Tenth Circuit (or the other courts of appeals that have not yet addressed either of those issues).